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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1287

ROBERT WEINSTEIN, *et al.*,

Petitioners,

v.

HOWARD E. BRADFORD

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT

The complaint herein was filed by respondent and another inmate of the North Carolina Department of Correction, acting with the assistance of another inmate but without legal counsel. It asserted the unconstitutionality, under the Due Process Clause of the Fourteenth Amendment, of the procedures followed by

the North Carolina Board of Paroles.[1] The allegations presently relevant are:

(1) Some inmates being considered for parole are not given a "hearing," i.e., an opportunity to appear in person in connection with consideration of their release on parole, and there are no sufficient criteria employed to determine whether or not a particular inmate will receive a hearing (Complaint, para. 2(c)(i), App. 4). Respondent was not given a hearing on any of the three occasions he was considered for parole (Complaint, paras. 8(a), (b), (c), App. 10).

(2) Inmates being considered for parole are not in any manner informed as to the factual and other data which the Board will consider in reaching its decision (Complaint, para. 2(c)(2), App. 4), and are therefore unable to refute "even the most demonstrably untrue information" (Complaint, para. 10(c)(iv), App. 12).

(3) Material is placed in an inmate's file "through a process which contains no substantial safeguards whatsoever" to insure reliability (Complaint, para. 10(c)(iii), App. 11-12). Board members base their decision on inaccurate and misleading information (Complaint, paras. 2(c)(7), 10(c)(i); App. 5, 11), and did so in respondent's case (Complaint, para. 8(d), App. 10).

(4) Hearings, when given, ordinarily take ten minutes or less, and decisions are made in less than five minutes (Complaint, para. 2(c)(5), App. 4-5). This is insufficient time to review the material, to interview the inmate, or

[1]A number of other issues were raised by the complaint, and ruled upon adversely by the District Court; they were not pursued on appeal, and are not referred to here.

to arrive at an informed decision (Complaint, para. 10(d), App. 12).

(5) Inmates financially unable to retain counsel are not afforded any representation (Complaint, para. 2(c)(4), App. 4).

(6) No written statement of the reasons for decisions, or the factual matters relied on, is provided to the inmate (Complaint, para. 2(c)(6), App. 5).

As a result of the foregoing, it was alleged, the decisions reached by the Board are based upon whim and caprice, and upon personal predilections or biases bearing no reasonable relation to the lawful discretion given the Board (Complaint, para. 10(e), App. 12).

In addition, respondent alleged that it was the practice of petitioner correctional authorities to require the submission of legal pleadings to them for photocopying prior to their being filed in court; that these copies were routinely included in the material made available to members or representatives of the Board of Paroles in connection with their consideration of inmates for release on parole; and that such material was often a significant factor in the decision to deny parole (Complaint, para. 2(c)(3), App. 4).

Respondent sought declaratory and injunctive relief designed to require modification of the procedures employed by the Board of Paroles in the respects asserted to be unconstitutional. No answer to the complaint was filed, and the District Court dismissed it on the merits, holding that "the Due Process Clause does not apply in procedures designed to determine suitability for parole" (App. 22). On respondent's appeal, the Court of Appeals appointed counsel for him, and reversed (Pet. 15), remanding the case for

factual proof and consideration of the scope of procedural protection required by the Due Process Clause (*id.* at 16). This decision was stayed pending disposition of a petition for certiorari, which was granted, __U.S.__, 95 Sup. Ct. 2394. The undersigned was appointed counsel for respondent, __U.S.__, 95 Sup. Ct. 2653.

SUMMARY OF ARGUMENT

A. The Court of Appeals correctly rejected the contention that jurisdiction over this suit under the Civil Rights Act of 1871 (42 U.S.C. §1983) is subject to the requirement of 28 U.S.C. §2254(b) that applicants for federal habeas corpus first exhaust State remedies. *Preiser v. Rodriguez*, 411 U.S. 475, which petitioners invoke here, reaffirmed a series of decisions holding that a §1983 action—specifically including one brought by prisoners against State correctional institutions—is not subject to an exhaustion requirement. It held that, where an inmate seeks "a determination that he is entitled to immediate release or a speedier release" (*id.* at 500), the "specific determination" (*id.* at 490) of Congress that habeas corpus relators first exhaust State remedies is implicated, regardless of the plaintiff's choice of jurisdictional base. Here, as in *Gerstein v. Pugh*, 420 U.S. 103, where *Rodriguez* was held inapplicable, the plaintiff is seeking *as relief* only a hearing, and may be released only if successful in a further administrative proceeding of problematic outcome. Moreover, even if applicable, 28 U.S.C. §2254(b) does not require exhaustion in this case, because under North Carolina law no State remedy is available or effective.

B. The Court of Appeals was also correct in rejecting the contention that the Due Process Clause of the Fourteenth Amendment is entirely inapplicable to the procedures employed to determine suitability for parole release. Petitioners' view, which has been rejected by a growing consensus of federal decisions, rests on a distortion of the realities of the parole system in the sentencing process, and a failure to recognize the flexibility and adaptability of the concept of due process as this Court has given it shape.

"[D]ue process is flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481. There is thus no choice presented between exclusive legislative and exclusive judicial competence, no choice between the "full panoply" of procedural rights employed in a criminal trial and total denial of any due process protection.

Release on parole is neither "leniency" nor "clemency," but "an integral part of the penological system," *Morrissey v. Brewer*, 408 U.S. at 477. It is today the dominant mode of release from prison. The "hope" of parole release is not a merely unilateral expectation of the prisoner; it is an interest legitimated by the expectations of legislators and sentencing judges in designing and carrying out a sentencing system. In these circumstances, it is not controlling that respondent is not entitled to release. The differences which exist between denial of release and revocation of parole are relevant to the content of due process protection, but as to the nature of the prisoner's interest and the applicability of due process, the same interest is at stake in both cases: future controlled liberty or future imprisonment.

Nor does the discretionary and predictive quality of the suitability decision warrant denial of all due process protection. Because the decision reflects not simply the finding of facts, or the application to them of a few reasonably well-settled principles, certain protections typically associated with due process are inapt. But, as recent experience of the U.S. Board of Parole illustrates, descriptions of the process as entirely an unfathomable, essentially mystical one, lose sight of the overall reality. There are significant aspects of the matter to which due process protections are appropriately relevant. Both the State and the prisoner "have interests in the accurate finding of fact and the informed use of discretion." *Gagnon v. Scarpelli,* 411 U.S. 778, 785.

Predictions that minimum due process safeguards will place an unbearable administrative burden on the parole system are not, under the consistent theme of this Court's decisions, relevant to the issue of applicability of due process. Legitimate State interests are to be given weight in determining the content of due process protection.

C. Should this Court affirm, as respondent urges, the ruling of the Court below that due process applies to release proceedings, it will face the question whether to define its content in this case. Respondent submits that the minimum standards of procedural due process should include a right to appear in person before the Board, a member, or a hearing examiner; an opportunity to know and rebut factual information which may prompt an adverse decision; an opportunity to consult with available counsel in preparing for the hearing; and a right to a written statement of the reasons for an adverse decision. In light of the undeveloped state of

the present record and the fragmentary nature of present knowledge about the parole system and the competing interests involved, respondent suggests that the Court defer consideration of the questions whether the prisoner has a right to see the actual case file made available to the examiner, and to have counsel or supporting witnesses present at the hearing itself. Respondent does not contend that due process requires the State to present "evidence" through witnesses, or to accord the right to confrontation; nor is there a right to have counsel assigned.

ARGUMENT

I.

THE JURISDICTION OF THE DISTRICT COURT WAS NOT AFFECTED BY THE REQUIREMENT OF 28 U.S.C. § 2254(b) THAT APPLICANTS FOR FEDERAL HABEAS CORPUS FIRST EXHAUST STATE REMEDIES

A. The Exhaustion Requirement of 28 U.S.C. § 2254(b), As Construed in *Preiser v. Rodriguez,* Does Not Extend to a Suit Seeking Only to Affect the Procedure of Future Parole Hearings

Petitioners' attempt to stretch this Court's decision in *Preiser v. Rodriquez,* 411 U.S. 475, to govern this case was properly rejected by the Court of Appeals (Pet. 17-19). The opinion of Mr. Justice Stewart for the Court in *Rodriguez* espoused three propositions, all relevant to the question at bar:

First, the Court reaffirmed its earlier decisions (a line of cases beginning with Justice Frankfurter's opinion in *Monroe v. Pape*, 365 U.S. 167) holding that there is no judicial requirement of exhaustion of State remedies in suits under the Civil Rights Act of 1871, 42 U.S.C. §1983 (411 U.S. at 477).

Second, the Court similarly reaffirmed the principle that a §1983 action was available to State prisoners no less than to others complaining of unconstitutional conduct engaged in under color of State law, and that there was to be no general rule that the special problems of federal involvement in State prison administration warranted an exhaustion requirement in prisoner suits under §1983 (see 411 U.S. at 498-99).

Third, the Court held that a prisoner "challenging the very fact or duration of his physical imprisonment, and . . . [seeking] a determination that he is *entitled* to immediate release or a speedier release" (*id.* at 500; emphasis supplied), may not avoid the exhaustion requirement of the habeas corpus statute[2] by basing the action on §1983 instead. Where the action is "close to the core" of habeas corpus (*id.* at 489), the Court held, the "specific determination" of Congress (*id.* at 490) that habeas corpus relators first exhaust state judicial remedies must be respected regardless of the plaintiff's choice of jurisdictional base.

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[2]28 U.S.C. §2254(b) provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Broad-ranging invocation of arguments addressed to "comity" and the avoidance of friction between State and federal authorities "in adjudicating the rights of State prisoners" (dissenting opinion below, Pet. 22), would cut *Rodriguez* loose from its careful grounding in "explicit congressional intent," 411 U.S. at 489, and convert the exhaustion requirement from a *legislative* one involving *habeas corpus* to a *judicial* one involving *State prisoners*. This is flatly inconsistent with *Rodriguez*; see *id.* at 492 n.10.[3]

Subsequent decisions support this analysis. In *Wolff v. McDonnell*, 418 U.S. 539, this Court held that *Rodriguez*, while barring an attack on the forefeiture of good-time credits by reason of allegedly unconstitutional disciplinary proceedings, did not require exhaustion as to an attempt to obtain "an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." *Id.* at 555. In *Gerstein v. Pugh*, 420 U.S. 103, 107 n.6, *Rodriguez* was held inapplicable to a claim by arrestees that they were constitutionally entitled to a judicial determination of probable cause for pretrial detention.

> Respondents did not ask for release from state custody. . . . They asked only that the state authorities be ordered to give them a probable cause determination. . . . Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy.

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[3]In light of this evolution of the law, the fact that the exhaustion rule was originally judicially promulgated, *Ex parte Hawk*, 321 U.S. 114, does not legitimate judicial expansion of the rule beyond the habeas corpus area.

The foregoing passage from Mr. Justice Powell's opinion in *Pugh* is fully applicable to the challenge to parole procedures; indeed, with words such as "constitutionally adequate parole hearing" substituted for "probable cause determination," they describe this case. For in both cases, the ultimate motive for the prisoner's challenge is the desire to enhance the likelihood of future release. But that insight does not convert this proceeding into a "challenge to confinement" (Brief of California, *amicus curiae*, p. 3), and it is simply not true, as petitioners casually assert, that the complaint herein "challenges the fact of physical confinement and seeks *as relief* a more speedy release from imprisonment" (Br. 3; emphasis supplied). Where release is not merely to take place in the future (as in the situation referred to by petitioners, Br. 4), but is the result of a further determination, yet to be made and of problematic outcome, the habeas corpus remedy is not the exclusive one.[4] Like respondents in *McDonnell*,

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[4]Indeed, parole is an *a fortiori* case from pretrial detention, as in *Pugh*, because it is, to a far greater degree, a discretionary judgment.

Section 1983 applies even though perhaps "it is arguable," *Preiser v. Rodriguez*, 411 U.S. at 499, that habeas corpus may be available to attack unconstitutional parole-hearing procedures; see the discussion, *id.* at 499-500. And it is of course wholly irrelevant whether habeas corpus, rather than some other proceeding, is the *State* remedy available, as is asserted to be the case in California (Brief of California, *amicus curiae*, p. 2). In fact, moreover, California *habeas corpus* practice specifically recognizes the distinction between release from custody and relief against unconstitutional procedures, whether remedying them will lead to ultimate release or not. *E.g.*, *Ex Parte Bramble*, 31 Cal.2d 43, 53-54, 187 P.2d 411, 417 ("Since [petitioner]

respondent here seeks an injunction against future unconstitutional procedures. Like those in *Pugh*, he seeks a proper hearing. Like those respondents—and, we would suppose all or nearly all litigating prisoners—his motive is probably the desire to end or shorten his imprisonment. But where it cannot be said that respondent is using § 1983 as a device to avoid calling a habeas corpus action by its proper name, the legislative judgment requiring exhaustion is not at risk. That is all that *Rodriguez* sought to protect.

B. Section 2254(b), Even if It were Applicable, would Not Require Exhaustion in This Case, Because of the Applicability of the Exceptions Provided For Where State Remedies Are Unavailable or Ineffective

Section 2254(b), by its own terms, specifically provides that exhaustion is not required where "there is *either* an absence of available State corrective process *or* the existence of circumstances rendering such process

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has not been presently admitted to parole . . ., he is not entitled to an order . . . that he be released from custody, but it is his right to have a request for parole considered and determined by the Adult Authority in the regular course of its proceedings and in light of the law . . . as herein above declared"); *Application of Bartges*, 44 Cal.2d 241, 248, 282 P.2d 47, 51 ("the writ should be granted, not to discharge the petitioner from custody . . . but to discharge him from only the illegal circumstances of his restraint"; writ granted, prisoner remanded to custody of sheriff to be arraigned before the court for resentencing, including power in the court "in its discretion" to grant or deny probation); *Application of Chessman*, 44 Cal. 2d 1, 6, 279 P.2d 24, 27 ("the prisoner may be discharged from illegal conditions of restraint although not from all restraint").

ineffective to protect the rights of the prisoner" (emphasis supplied). Respondent argued below that both of these limitations on the exhaustion requirement applied. Ruling as it did that Section 2254(b) was inapplicable under *Rodriguez*, the Court of Appeals did not reach these contentions. Respondent has not abandoned them and briefly sets them forth here.[5]

As to availability, petitioners concede (Br. 4) that neither the North Carolina Post Conviction Hearing Act, No. Car. Gen. Stat. §15-217, nor the Habeas Corpus statute, No. Car. Gen. Stat. §17-1, reaches the claims raised here. They refer to *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259, as authorizing utilization of the Declaratory Judgement Act, No. Car. Gen. Stat. §1-253, in a suit against the Board of Paroles. But that case challenged the Board's interpretation of a statute dealing with the effect of parole revocation on the computation of future "prison time," and relied on the availability of declaratory judgments to "any person whose rights, status or other legal relations are affected *by a statute* . . . [to] have determined any question of construction or validity *under the . . . statute*. . . ." Gen. Stat. §1-254 (emphasis supplied). Applying that language, the Supreme Court of North Carolina held declaratory relief available "when a specific provision of

[5]Judge Bryan was in error in stating, in dissent below (Pet. 23), that "it is not questioned" that adequate and available state remedies exist. The State did indeed so assert, as he said, but those representations *were* disputed in respondent's brief below.

The dissent below was also in error in its reference to State administrative as well as judicial remedies (Pet. 23, 25). Section 2254(b) specifically speaks of remedies "available in the courts of the State. . . ."

a statute is challenged. . .," *id.* at , 184 S.E.2d at 264. The case now at bar, challenging only the procedures employed by the Board of Parolees, falls outside the plain language of the Declaratory Judgment Act, and the reach of the *Jernigan* opinion.

Even if it were jurisdictionally available, it is plain that in this case resort to State court would be "ineffective to protect" (28 U.S.C. §2254(b)) the constitutional rights here asserted. The Supreme Court of North Carolina has ruled as recently as 1972 that concepts of due process have no application to parole proceedings, quoting approvingly language stating that a prisoner "does not qualify for procedural due process in seeking parole." *Goble v. Bounds*, 281 N.C. 307, 311, 188 S.E.2d 347, 350. Accordingly, it would have been futile to lay the complaint filed herein before a State court, and Section 2254(b) was therefore satisfied. See *Evans v. Cunningham*, 335 F.2d 491 (C.A. 4); *Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1098-1100 (1970).

On either of the foregoing grounds, the District Court had jurisdiction over the case, and the decision of the Court of Appeals to reach the merits was correct.

II.

PAROLE BOARDS CONSIDERING THE QUESTION OF SUITABILITY FOR RELEASE ARE REQUIRED TO AFFORD PRISONERS, AS MINIMUM PROTECTIONS OF PROCEDURAL DUE PROCESS, A HEARING, AN OPPORTUNITY TO KNOW AND REBUT FACTUAL INFORMATION WHICH MAY PROMPT AN ADVERSE DECISION, AN OPPORTUNITY TO CONSULT WITH AVAILABLE COUNSEL IN PREPARING FOR THE HEARING, AND A WRITTEN STATEMENT OF THE REASONS FOR AN ADVERSE DECISION

On the merits of the case, respondent will speak first to the contention, rejected by the Court of Appeals below, that the Due Process Clause is entirely inapplicable to parole-release decisionmaking,[6] and then (after briefly considering the appropriateness of this Court's here reaching the question) will attempt to set forth the minimum protections which should comprise the content of due process in this field.

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[6]This brief is not addressed to the question raised by proceedings in which a parole board or its equivalent is empowered to fix the minimum period a prisoner must serve before becoming *eligible* for parole. *E.g.*, N.Y. Penal Law §70.00(3)(c). Such a proceeding is more closely analogous to deferred sentencing imposed by a court. *Cf. Mempa v. Rhay*, 389 U.S. 128.

A. The Due Process Clause Is Applicable to the Procedures Employed in Parole-Release Decisionmaking

Petitioners renew in this Court their contention that the Due Process Clause of the Fourteenth Amendment has no application to parole-release procedures, a contention rejected not only by the Court of Appeals for the Fourth Circuit below (Pet. 11-15), but by the Second and District of Columbia Circuits as well. United States *ex rel. Johnson v. Chairman*, 500 F.2d 925 (C.A. 2), vacated as moot *sub nom. Regan v. Johnson*, 419 U.S. 1015; *Childs v. United States Board of Parole*, 511 F.2d 1270 (C.A.D.C.).[7] Petitioners' position, in brief, rests on a distortion of the realities of the parole system—its role in the sentencing process, its operations and processes, the relation of inmates to it—and on a failure to recognize the flexibility and adaptability of the concept of procedural due process as this Court has given it shape.

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[7]In addition, the Seventh and Tenth Circuits have spoken favorably of the strength of the case for the applicability of the Due Process Clause, while upholding challenges to U.S. Board of Parole procedures on statutory grounds. *King v. United States*, 492 F.2d 1337, 1342-43 (C.A.7); *Mower v. Britton*, 504 F.2d 396,397 (C.A.10). And *cf.* the Third Circuit decisions in *Fisher v. Cahill*, 474 F.2d 991, and *Laffey v. Sigler*, __F.2d__ (No. 74-2158, June 20, 1975).

In light of these decisions—and see note 9, *infra*, for the Fifth Circuit cases—the Solicitor General's description of the weight of Court of Appeals authority, Br. *amicus curiae*, p. 24 n.8, is quite misleading. The fact is that, since Mr. Chief Justice Burger's landmark opinion in *Morrissey v. Brewer*, 408 U.S. 471, *no* Circuit has held to the position asserted by petitioners here.

1. The Flexibility of the Due Process Clause.

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481. Accordingly, hearings to determine continued eligibility for public assistance must afford the rights of confrontation and cross-examination and the assistance of retained counsel, but do not require the appointment of counsel, *Goldberg v. Kelly*, 397 U.S. 254; hearings looking toward revocation of probation or parole may, on finding of good cause by the hearing officer, withhold the rights of confrontation and cross-examination, *Morrissey v. Brewer*, 408 U.S. at 487-89, but there is a right to appointed (as well as retained) counsel in certain designated circumstances, to be decided on a case-by-case basis, *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91; inmates facing prison disciplinary proceedings have no right of confrontation, but are afforded a limited right to call witnesses on their behalf and to have the assistance of a counsel-substitute, *Wolff v. McDonnell*, 418 U.S. 539, 567-70; students facing public school disciplinary proceedings need not be afforded the right to call supporting witnesses (nor, *a fortiori*, are they entitled to the rights of confrontation or legal assistance), but they do ordinarily have the right to prior notice and an opportunity to appear personally to present their version of events, *Goss v. Lopez*, 419 U.S. 565, 581.

In this process of "mutual accommodation" (*Wolff v. McDonnell*, 418 U.S. at 556) among competing interests, there is no room for the "all or nothing" approach frankly avowed by the Commonwealth of

Virginia (Brief *amicus curiae*, p. 5)[8] and only more subtly conjured up by such casual phrases as the petitioners' "adversary procedural format" (Br. 17) or the District Court's "plenary hearings" (App. 23). Indeed, the Court of Appeals' decisions which petitioners invoke–*Menechino v. Oswald*, 430 F.2d 403, and *Scarpa v. United States Board of Parole*, 477 F.2d 278–reach results entirely consistent with respondent's contentions here, as Judge Mansfield, the author of *Menechino*, expressly recognized as to that case in his opinion for the court in *Johnson*.[9]

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[8] "*[O]rdinary* due process requirements . . . would tend to bankrupt and disrupt the parole system . . . [but] if *none* of these requirements were applicable . . ., a decision holding the clause to be applicable would be somewhat meaningless." Va. Br. 5 (Emphasis supplied).

[9] *Johnson*, like the court below, held that "some degree of due process attaches to parole release proceedings." 500 F.2d at 928 n.2. It limited its earlier *Menechino* ruling to a holding (with which we do not quarrel) that the parole applicant there, seeking a "whole gamut" of procedural protections (principally the right to counsel at the hearings and the right to cross-examine witnesses), was not entitled to this "full panoply" of due process rights. The language of *Menechino* relied on by petitioners here (Br.9) was reconsidered, in light of the realities of the parole process and the *Morrissey* decision of this Court. See 500 F.2d at 927-28. The decision in *Johnson* was vacated by this Court on grounds of mootness, *sub nom. Regan v. Johnson*, 419 U.S. 1015.

Scarpa, as the court viewed it, was a challenge to the authority of the Board of Parole to give conclusive weight to the applicant's criminal record in denying parole. Scarpa sought a hearing at which he might bring other facts, relating to his family and employment situation, more adequately to the Board's attention. The court held (correctly, in our view) that the Board had discretion to give controlling weight to the factor it relied

Similarly, the Solicitor General's vague forebodings (Br. *amicus curiae*, pp. 4-5), that Congressional competence to respond as evolving concepts of wise parole policy suggest "could" be "hindered," "precluded," or "substantially affected" by an affirmance here, rest on a false dichotomy between exclusive legislative and exclusive judicial competence which, at bottom, is only the "all or nothing" approach in separation-of-powers garb. It is relevant to note, not only that the House-passed bill to which the Solicitor General refers (*id.* at 4 & n.2) is entirely consistent with respondent's contentions here, see p. 38, *infra*, but that to its principal sponsor the "infusion of due process" into parole release decision-making–"clearly a necessary step forward"–is part of a regime of complementary, rather than mutually exclusive, judicial and legislative action. Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Decline of Mythology*, 22 Am. U.L. Rev. 477, 522 (1973).

In considering the question of the applicability of due process, it is by now clear beyond argument that neither the fact that we are dealing with convicted

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on. 477 F.2d at 282; *cf. Creason v. North Carolina Bd. of Paroles*, __F.2d__ (No. 75-1534, June 3, 1975). The *Scarpa* decision was vacated by this Court for consideration of the question of mootness, 414 U.S. 809, and vacated as moot, 501 F.2d 992 (en banc). The Fifth Circuit has since ruled that the constitutional issued addressed by the broader dicta from *Scarpa*, on which petitioners rely (Br. 8), should be reconsidered by the court on a factual record. *Ridley v. McCall*, 496 F.2d 213, 214 ("*Scarpa* has no precedential value"). The Solicitor General cites *Scarpa* as reflecting the law of the Fifth Circuit, Br. *Amicus Curiae* 24 n.8, without mentioning *Ridley*.

prisoners, nor the fact that there is no right to parole, is dispositive of the question. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. at 555-56. And "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374. The case for drawing the line short of applicants for parole rests on characterizing a prisoner's interest in parole as "nothing more than a hope" (Br. for Pet. 8), too evanescent to warrant characterization as either "liberty" or "property," and on viewing the release decision as *wholly* the exercise of an "intangible," "predictive" discretion (*id.* at 18). Respondent submits that, for reasons now to be set forth, these notions draw insufficient support from the reality of the functions and operations of the parole system and, in truth, simply resurrect the rejected "privilege" concept in more refined terms.

2. The Nature of a Prisoner's Interest in Parole Release.

The insight into "the function of parole in the correctional process" with which the Chief Justice began the opinion of the Court in *Morrissey v. Brewer* is the essential point of departure:

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentence has become an integral part of the penological system.... Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into

> society as constructive individuals as soon as they are able. . . . It also serves to alleviate the costs to society of keeping an individual in prison.

408 U.S. 471, 477. This concept of parole as "an integral part" of penology has three relevant ingredients. *First*, as the Chairman of the U.S. Board of Parole has noted, "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?*, Fed. Prob., p. 47 (June 1975). "[T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence. . . . Parole legislation involves essentially a delegation of sentencing power to the parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967). In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 Calif. L. Rev. 1518, 1534 (1972). *Second*, release on parole is not an exceptional stroke of good fortune, saving a few prisoners from serving their full term. In 1970, 72% of those adult felons who left prison did so on parole; "parole is the predominant mode of release for prison inmates today, and it is likely to become even more so." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 389 (1973).[10] The Official Report of the New York State

[10]The earlier *Report* of the Task Force on Correction of the President's Commission on Law Enforcement and Administration of Justice reports a figure, as of 1967, in excess of 60 percent (*id.* at 60 (1967)). See also the data cited in Judge Mansfield's opinion in *Johnson v. Chairman*, 500 F.2d at 928.

Commission on Attica expressed the truth tersely: "In practice, the Parole Board—not the judge—decides how long an inmate will serve time." *Attica* 93 (1972). *Third*, parole release is not "leniency." Studies have shown that "actually prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 62 (1967). According to a recent survey, the great majority of federal judges consider parole in sentencing, and approximately one-half set the sentence on the assumption that the prisoner will be released on parole after serving one-third of it. Two-thirds of the judges said that they expected sentenced defendants to be released before serving the maximum sentence imposed. Note, *Parole Release Decision-making and the Sentencing process*, 84 Yale L.J. 810, 882 n.361 (1975). Thus, "today . . . the legal maximum is not considered the norm. Parole . . . should not be considered any more a matter of grace than any sentence which is less than the maximum provided for by statute." *Id.* at 86.[11]

In sum, the "hope" of parole release is one which is realized for a very large number of prisoners; which is expected to be so realized by legislators in setting statutory maxima and by judges in making partially-indeterminate sentences; and which is realized or not by a process which is essentially one of deferred determination of the wisdom of continued incarceration or controlled liberty. It is, therefore, "more than an

[11]*Cf.* the explicit declaration of the Texas statute:

"A parole shall be ordered only for the best interests of society, not as an award of clemency. . . ." Code Crim. Proc., Art. 42.12, §15.

abstract need or desire . . ., more than a unilateral expectation . . ." of release (*Board of Regents v. Roth*, 408 U.S. 564, 577); it is an expectancy which "has real substance" (*Wolff v. McDonnell*, 418 U.S. at 557).[12]

In these circumstances, it is not controlling that respondent is not entitled to release. As Professor K. C. Davis has observed: "[O]ne who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity." Davis, *Administrative Law Text* 177 (3d ed. 1971). Prisoners in respondent's circumstances have been specifically told by the North Carolina legislature that they "shall be eligible to have their cases considered for parole. . .," and that the statute "shall be construed as . . . guaranteeing to every prisoner a review and consideration of his case upon its merits." No. Car. Gen. Stat. Ann. §148-58.[13] This promise—which makes explicit what is implicit in the parole system generally—is one "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. It is

[12]The Solicitor General's characterization of the prisoner's expectations as "self-generated" (Br. *amicus curiae*, p. 25) draws no sustenance from the total reality of the sentencing process.

[13]The statute reads in full as follows:

> "All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits."

therefore within the ambit of interests subject to the protection of procedural due process.[14]

Petitioners' suggestion that for purposes of the applicability of the Due Process Clause, there is a line of constitutional significance between revocation and release proceedings, between staying in and going back (Br. 8-10), is, in Judge Mansfield's words, "a distinction too gossamer-thin to stand close analysis." *Johnson v. Chairman*, 500 F.2d at 928. It is flatly inconsistent, even in concept, with a number of decisions in which this Court has refused to find so wide a gap between the interests of those seeking to obtain, and those seeking to retain, some governmental benefit. See, *e.g.*, *Willner v. Committee on Character and Fitness*, 373

[14]Any broader reading of *Roth*, to require a technical "entitlement" to parole in the sense of a litigable property right (as the Solicitor General would have it, Br. *amicus curiae*, pp. 20-22), is unwarranted. *Cf.*, for example, *Flemming v. Nestor*, 363 U.S. 603, where the Court, having first specifically rejected the contention that the interest in social-security benefits was an "accrued property right," *id.* at 610, immediately went on to hold that it was "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611. And *cf. Goss v. Lopez*, 419 U.S. 565, 572-74.

A similar result is called for even on the approach adopted by three members of this Court in *Arnett v. Kennedy*, 416 U.S. 134, 151-55 (opinion announcing judgment, by Rehnquist, J.), for the statutory "guarantee" of a review and consideration of parole suitability "upon its merits" (n. 13, *supra*) is *not* one which "expressly provided also for the procedure by which [suitability] was to be determined, and expressly omitted the procedural guarantees which [respondent] insists are mandated by the Constitution." *Id.* at 152. The position of the majority of the Court in *Arnett v. Kennedy a fortiori* supports respondent's position here. See *id.* at 166-67 (Powell, J.), 185 (White, J.), 210-11 (Marshall, J).

U.S. 96, and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (admission to the Bar); *Speiser v. Randall*, 357 U.S. 513 (application for tax exemption); *Simmons v. United States*, 348 U.S. 397 (application for draft exemption); *cf. Hornsby v. Allen*, 326 F.2d 605 (application for a liquor license).[15] There is, to be sure, a difference between denial of release and revocation, principally with regard to the specificity of the basis for the adverse action; and (as we recognize below) that difference warrants a lessened degree of protection. It would be arid conceptualism to let it control the question of applicability.[16]

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[15]There is one area where the distinction urged by petitioners has found voice in earlier decisions of this Court. That is in immigration, where some decisions deem constitutional protections available to those sought to be deported, but not those seeking admission. *E.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206. Far from reflecting any principle of general applicability, those decisions, if supportable at all, reflect the unique circumstances of Congressional power over aliens seeking to enter the country. That they are inconsistent, even within that specific field, with the constitutional traditions of this Court has been demonstrated with memorable power and eloquence by the late Professor Henry M. Hart; see Bator, Mishkin, Shapiro & Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 350-56 (2d ed. 1973).

[16]*Cf.* the analysis offered by the Solicitor General (Br. *amicus curiae*, p. 17), which acknowledges that "liberty" is at stake, but denies that the prisoner can be "deprived" of it by the denial of parole release, since he has, "in a very basic sense," already been deprived of liberty by his sentence until its maximum term has run. This perspective on the sentencing process is, as the foregoing paragraphs make clear, a serious distortion of reality. Indeed, it leads inevitably to the position that even the parolee lacks a "liberty" interest, and that *Morrissey v. Brewer, supra*, though "purportedly" speaking of liberty, was "in fact" a property case (Br., p.20 n.7). Thus, the Solicitor General rejects both the legal analysis, 408 U.S. at 482, and the view of the sentencing process, *id.* at 477 (p. 19, *supra*,) which are at the core of the *Morrissey* decision.

As to the weight of the prisoner's interest, in either case the question for the future is the same: incarceration or controlled liberty.[17] While the parolee suffers a different sort of worsening of his condition if he loses that liberty, the question is not which group of persons is worse off, but whether the prisoner's situation is also significantly worsened when he learns that his incarceration must continue. It cannot be said that it is not. Freedom is one of the strongest, most universal aspirations of mankind, one which is legitimated by our most basic religious and political traditions and, as to prisoners, legitimated by the function served by parole in the correctional system; no prisoner should be presumed so dehumanized or debased that he may be said to be no worse off if he is "merely"[18] continued in prison.

3. The role of Discretion and Predictive Judgment in Parole-Release Decisionmaking.

The notion that due process concerns should play no role in parole-release decisionmaking because it involves a discretionary, predictive, professional judgment–"a difficult decision . . . based on many factors," in the

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[17]In *Wolff v. McDonnell, supra*, the Court considered, as a factor affecting the requisite *degree* to which disciplinary proceedings called for protection, the likelihood that forfeiture of good time would cause denial or delay of parole. 418 U.S. at 561. The Court's evident assumption was that such postponement of supervised release was an even more serious harm than forfeiture of good time.

[18]The Solicitor General's term, Br. *amicus curiae*, p. 18.

words of the District Court below (App. 21-22)[19]– reflects the hazards of letting a partial truth serve as the whole truth. The release decision, respondent acknowledges, is not *simply* the finding of facts, not *simply* the application of a few reasonably well-settled principles to known or adjudged facts. And that perception, we shall acknowledge below, suggests the inaptness of certain procedures typically associated with due process (such as the rights of confrontation and cross-examination, and perhaps even the right to call supporting witnesses). But this Court has recognized that rhetoric about the special characteristics of correctional institutions must be tempered by candid and sober recognition of competing realities. *E.g., Gagnon v. Scarpelli,* 411 U.S. 778, 785, counselling against "an exclusive focus on the benevolent attitudes of those who administer the probation/parole system"; *In re Gault,* 387 U.S. 1, and *Breed v. Jones,* __U.S.__, 95 Sup.Ct. 1779, applying due process concepts to juvenile-court proceedings, recognizing "that there is a gap between the originally benign conception of the system and its realities." *Id.* at ___, 95 Sup. Ct. at 1785; *In re Gault,* 387 U.S. at 21-22.

[19]The dicta (now withdrawn, see p. 17, *supra*) of the Second Circuit's opinion in *Menechino v. Oswald* are even more eloquent: "There are no "charges" or accusations against [a parole applicant]. Nor is the Board necessarily called upon . . . to resolve disputed issues of fact. . . . It must make the broad determination of whether rehabilitation of the prisoner and the interests of society would best be served [by parole or confinement]. It must consider many factors of a non-legal nature. . . . Far more important [than law] is an understanding of . . . factors . . . which have to do with medicine, psychiatry, criminology, penology, psychology and human relations." 430 F.2d at 407-08.

The obvious fact is that "correctional judgments turn on matters of historical fact concerning the offender, as well as scientific ones." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes,* 75 Harv. L. Rev. 904, 927 (1962).[20] The accuracy of this simple perception is strikingly indicated by recent actions of the United States Board of Parole. In an attempt to reduce by its own initiative "the arrant subjectivism of undisciplined and unguided discretion," Kadish, *ibid.*, the Board has promulgated detailed Guidelines setting forth normal periods of incarceration for inmates to serve before release "for various combinations of offense . . . and offender . . . characteristics . . . [assuming] good institutional adjustment and program progress." 28 C.F.R. §2.20(b), as amended, 40 F.R. 41333 (1975).[21] The average time to be served is found by measuring the classification given the particular offense–e.g., minor theft is "low," theft of a single motor vehicle not for resale is "moderate," organized vehicle theft is "high," robbery is "very high"–with the "offender characteristics" as disclosed by the "salient factor score." This last comprises the applicant's parole prognosis as measured by nine factors. The startling fact is that seven of the nine factors relate to the inmate's pre-incarceration record and behavior, generally known to the inmate and the sentencing judge as the time of sentencing; that none of them involve "delicate" or "sensitive" or "confidential"

[20]See also, by the same author, Kadish, *The Advocate and the Expert – Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803, 829 (1961).

[21]A copy of the Guidelines, as most recently revised, is annexed to this brief as Appendix B.

matters; and none involve subtle, complex psychological-medical-criminological evaluations.[22]

Thus, the Board's own exercise of discretion has gone far to demystify the parole process, and to put in perspective the more extravagant descriptions of parole. While parole decisionmaking remains a complex, multi-faceted inquiry not analogous to a typical lawsuit, it is now clear—as indeed it was heretofore—that there *are* matters relevant to the decision to which the protections of due process are appropriately relevant. Indeed, descriptions of the process as essentially a mystical, unfathomable one reflect nothing more than the "all or nothing" approach to due process which, as we argued above (p. 17), this Court has effectively laid to rest.

It is plain, then, that the perceptions given voice in *Morrissey* and *Scarpelli* have some substantial applicability to release decisionmaking. "Both the . . . parolee and the State have interests in the accurate finding of fact and the informed use of discretion," *Gagnon v. Scarpelli*, 411 U.S. at 785; "Society thus has an interest in not having parole revoked because of erroneous information . . . and . . . a further interest in treating the parolee with basic fairness," *Morrissey v. Brewer*, 408

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[22]The Salient Factors are: number of prior convictions, number of prior incarcerations, age at first commitment, presence of auto theft, prior revocation of parole, history of heroin or opiate dependence, high school graduation or equivalent, verified recent employment or school attendance prior to incarceration, release plans to live with spouse or children. See App. B, *infra*, 40 F.R. at 41337. See generally Note, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810, 822-28 (1975), for a description of the system.

U.S. at 484. The vehicle by which our constitutional traditions seek to safeguard these interests is the flexible concept of due process. As Mr. Justice Frankfurter observed in his oft-cited concurring opinion in the *Joint Anti-Fascist* case:

> That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72. And *cf. In re Gault*, 387 U.S. at 21.

4. The Administrative Burden of Minimum Due Process.

Petitioners conclude with the standard predictions that minimum due process safeguards will place an unbearable administrative burden on the Board of Paroles (Br. 18, quoting also from the opinion of the District Court). This Court has quickly put such contentions in their proper perspective. A footnote in *Breed v. Jones*, __U.S.__, 95 Sup. Ct. 1779, 1789 n.5, readily acknowledged "that the flexibility and informality of juvenile proceedings are diminished by the application of due process standards," but replied: "Due process standards inevitably produce such an effect, but that tells us no more than that the

Constitution imposes burdens on the functioning of government and especially of law enforcement institutions." *Cf. Gagnon v. Scarpelli,* 411 U.S. at 782 n.5; *Taylor v. Hayes,* 418 U.S. 488, 500. "A simple factual hearing will not interfere with the exercise of discretion." *Morrissey v. Brewer,* 408 U.S. at 483. Parole boards are not unique among government agencies in their interest in "speedy resolution" of cases, in "dealing with [applicants] informally," and in managing "very burdensome caseloads," *Goldberg v. Kelly,* 397 U.S. at 267, and this Court has not found it difficult to accommodate legitimate State interests, in the correctional field as elsewhere, in articulating the content of due process protection.

It would be ironic to see parole uniquely insulated from the strictures of minimum due process, in light of the near-unanimity with which scholars, legislative committees, official and citizens' study commissions, and judges have criticized the arbitrariness of the parole process as traditionally carried on. So experienced and careful a scholar as Professor K.C. Davis flatly concluded in 1969 (prior to recent reforms): "[T]he performance of the Parole Board seems on the whole as low in quality as anything I have seen in the federal government. . . ." Davis, *Discretionary Justice* 133 (1969). A recent report of the House Judiciary Committee set forth the observations of one of its Subcommittees in these terms:

> Everywhere the Subcommittee went they found universal dissatisfaction with the parole process. Wardens claimed that it was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of

> the sentencing process. . . . The parole system has long been recognized as the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map.

H. R. Rep. No. 94-184, 94th Cong., 1st Sess., at 3 (1975). *Cf.* Judge Marvin Frankel's reaction: "In all disarming candor, [the Parole Board] presents itself as the epitome of lawless authority." Frankel, *Criminal Sentences* 48 (1972). The Chairman and Chief Counsel of a House of Representative Subcommittee which extensively studied the parole system observed: "[P]arole epitomizes for most inmates a system of whim, caprice, inequity, and nerve-wracking uncertainty." Kastenmeier & Eglit, *Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology,* 22 Am. U.L. Rev. 477,488 (1973). The Official Report of the New York State Special Commission on Attica reached similar conclusions: "Inmates' criticism were [sic] echoed by many parole officers and corrections personnel, who agreed that the operation of the parole system was a primary source of tension and bitterness within the walls." *Attica* 93 (1972).[23] That judicial "intervention"

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[23]On the qualification of members of parole boards, see O'Leary & Nuffield, *A National Survey of Parole Decisionmaking,* 19 Crime and Delinq. 378, 383 (1973):

> "The standards promulgated by the American Correctional Association specify that a parole board member should "command respect and public confidence"; should be appointed "without reference to creed, color, or political affiliation"; should possess "academic training which has qualified a board member for professional practice in a field such as criminology, education, psychiatry, psychology, law, social work, and sociology"; and should have "intimate knowledge of common situations and problems

is far from a threat to the growth of a sound parole system has been attested to by the current Chairman of the U.S. Board of Parole: "Much has been done to improve parole, and I would be the first to say that the courts have been extremely influential in this respect." Sigler, *Abolish Parole?*, Fed. Prob., June 1975, at 48. It would be tragic to see that influence removed by ritualized references to a "delicate predictive task" and "unreasonably burdensome" procedures (Br. for petitioners, at 18).

"Especially in view of the human values at stake, therefore, the position that in these inquiries the subject may be deprived of the elementary concomitants of a hearing, wherein he may be advised of the factual issues of relevance with an opportunity to contest their accuracy and their implications, is at war with fundamental conceptions of procedural justice." Kadish, *supra*, 75 Harv. L. Rev. at 928. In seeking to subject parole release decisionmaking to minimum constitutional safeguards, respondent rests ultimately on no more controversial ground than that the discretion of the parole board is a discretion to be exercised under the law. The principle respondent invokes has not been better stated than in the following description of decisions of this Court by Professor Hart:

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confronting offenders." The 1966 survey found that relatively few states had statutory criteria that would measure up to these standards; the 1972 survey indicated little change. Twenty-four jurisdictions have no statutory requirements for parole board members responsible for the release of felony offenders. One state makes generalized references to character; twenty-one states refer broadly to experience or training."

> "Before long, however, [the Court] began to see that . . . a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary. It saw that, on the contrary, the very existence of a jurisdiction in habeas corpus, coupled with the constitutional guarantee of due process, implied a regime of law. It saw that in such a regime the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and . . . that human beings were not unreasonably subjected . . . to an uncontrolled official discretion."

Bator *et al, op. cit. supra,* at 350-51.

The decision of the Court of Appeals, holding that parole-release decisionmaking procedures are subject to the Due Process Clause, should be affirmed.

B. The Minimum Standards of Procedural Due Process in Parole Release Proceedings Include the Right to a Hearing, an Opportunity to Know and Rebut Factual Information Which May Prompt an Adverse Decision, an Opportunity to Consult With Available Counsel in Preparing for the Hearing, and the Right to a Written Statement of the Reasons for an Adverse Decision

1. The Appropriateness of Reaching the Question.

If the Court holds, as we have argued, that the Due Process Clause is not entirely inapplicable to parole-release determination, the question then arises, "what process is due," *Morrissey v. Brewer,* 408 U.S. at 483. The court below did not address that issue on the

ground that, the case having arisen solely on the dismissal of respondent's unanswered complaint, petitioners' "practices and procedures with respect to parole eligibility proceedings have not been shown", and their "interests in preserving the practices and procedures currently followed have not been developed" (Pet. 16). Because of the limited nature of the Court of Appeals' action–contrast, for example, the situation presented in *Gerstein v. Pugh*, 420 U.S. at 125 n. 27–as well as the considerations which prompted it, this Court may deem it appropriate to go no further. Such an action would permit the Court to give content to the due process requirement on the basis of full records describing practices and competing interests, in North Carolina and other States, established and sharpened through the fact-finding processes of litigation on the merits. Cf. the comparable judgment of the Fifth Circuit, remanding a case challenging parole board procedures for "development of the actual facts, not just the pleaded contentions of the parties." *Ridley v. McCall*, 496 F.2d 213, 214.

The Court may be reluctant, however, to leave the matter so wholly unresolved. The District Court, although holding that the Due Process Clause did not apply at all, went on specifically to reject each particular procedural protection sought by the complaint (App. 22-23). In addition, similar issues are raised in many cases pending throughout the state and federal courts. Moreover, in analogous areas–*Morrissey v. Brewer, supra* (parole revocation); *Wolff v. McDonnell*, 418 U.S. 539 (disciplinary proceedings); *Gerstein v. Pugh, supra* (pretrial detention); and *cf. Goss v. Lopez*,

419 U.S. 565 (suspension from school)–the Court's initial ruling has frequently gone beyond the principle that due process requirements apply. Therefore–and also because the Court may find resolution of the question of due-process-applicability less abstract if its content is addressed by counsel as well–respondent presents in this section his contentions as to what this "particular situation demands." *Morrissey v. Brewer*, 408 U.S. at 481.[24]

If these questions are reached, however, it is essential to bear in mind the fragmentary state of present general knowledge about parole procedures and the realities of the parole process. As the current Chairman of the United States Board of Parole recently observed, for many years parole "was a world of its own, sealed off from public scrutiny." Sigler, *Abolish Parole?*, Feb. Prob., at 43 (June 1975). The "facts" as to the operation of the system, whether in North Carolina or more generally, should not be taken from the rosy-hued "testimony" of government lawyers. The description, for example, of the North Carolina system set forth in petitioners' brief (pp. 15-16 & n.4), and restated in that of the Solicitor General (pp. 6-7), comprises assertions as to matters of fact which are not in the record, which at several points impermissibly (given the procedural posture of the case) contradict several allegations of the complaint, and which in general

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[24]In *Morrissey v. Brewer, supra*, the Court took a middle ground. A number of minimum requirements were spelled out, but the question of right to retained or appointed counsel was reserved. 408 U.S. at 489. *Cf. Wolff v. McDonnell, supra*, where the Court made clear that the protections it was requiring were minimum ones, and left open the possibility of augmenting them in light of evolving prison conditions. 418 U.S. at 568, 571-72.

substitute rhetoric for litigation as the method of learning the truth. Respondent has attempted, in what follows, to base his contentions on the realities of the parole system to the extent they are suggested by published materials. Ultimately, however, respondent has a right, like all litigants, to a "day in court" if matters of fact or practice, contrary to those he asserts, are thought to be dispositive.[25]

2. The Minimum Standards of Procedural Due Process.

(a) Introduction and Summary.

Respondent submits for the Court's consideration the following summary of the minimum standards of procedural due process properly applicable to parole-release determinations:

(1) The right to appear in person for a reasonable period of time before the Board, a Board member or a hearing examiner, except where the prisoner is clearly ineligible for parole on the basis of undisputed facts under a valid eligibility rule not subject to waiver in individual cases; and to submit supporting written material in advance of the hearing for inclusion in the file made available to the person conducting the hearing.

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[25]The embryonic state of present knowledge about the world of parole suggests that the Court should make clear, as it did in *Wolff v. McDonnell*, 418 U.S. at 567, 571-72, that any standards of due process it adopts in this case are minimum ones, subject to augmentation in light of proofs yet to be made regarding competing interests.

(2) The right to adequate notice of, and an adequate opportunity at any hearing to rebut, information and recommendations which may prompt a denial or postponement of parole. Where such notice is given through a summary which preserves the confidentiality of sensitive matter, the summary must sufficiently apprise the prisoner of the nature and tenor of the factors that might lead to an adverse decision.

(3) The right to the assistance of such counsel or counsel-substitute as may be available in preparing for the hearing. This right shall include an opportunity for counsel or counsel-substitute to have access to, and consult with the prisoner about, the material referred to in the preceding paragraph.

(4) The right to a written statement of the reasons for any denial or postponement of parole, with sufficient particularity to provide meaningful disclosure of any factual matters on which it was predicated and of any area of the prisoner's failure and the ways in which he might qualify in the future.

The procedural protections which are claimed reflect an attempt to respect the concern for "mutual accommodation between institutional needs and objectives" and constitutional safeguards, *Wolff v. McDonnell*, 418 U.S. at 556, which has animated this Court's recent due process decisions in the correctional field and elsewhere. *Cf. Franklin v. Shields*, __F.Supp.__, 17 Cr. L. Rep. 2494 (W.D. Va., Aug. 5, 1975). They not only are far less than the "minimum procedural safeguards," *Goldberg v. Kelly*, 397 U.S. at 267, tailored for adversary proceedings—see, *e.g.*, *Morrissey v. Brewer*, 408 U.S. at 489; *Goldberg v. Kelly*, 397 U.S. at 267-72; *In re Gault*, 387 U.S. 1,—they are supported

by, but stop significantly short of, proposals for reform which responsible public bodies have recently concluded can be adopted in the parole-release process without endangering legitimate institutional interests, and should be adopted to protect legitimate prisoner and societal interests in fairness and equity. Thus, the Administrative Conference of the United States has recommended that the file, and not merely a summary, ordinarily be disclosed to the prisoner, and that counsel be permitted to assist at the hearing and not merely in preparation for it. Administrative Conference Recommendation 72-3, 25 Ad.L.Rev. 531, 533, 534 (1973). The House of Representatives has recently passed and sent to the Senate a proposed "Parole Reorganization Act of 1975," which would have similar effect. See H.R. 5727, 94th Cong., 1st Sess., §1 (proposed §4208(a)(2), (b), (c)), 121 Cong. Rec. H4521 (May 21, 1975).

(b) The right to an adequate hearing.

Forty-five jurisdictions grant an opportunity to be heard in person to all prisoners whose suitability for parole is being reviewed.[26] O'Leary & Nuffield, *A National Survey of Parole Decision-making*, 19 Crime

[26]In North Carolina, such review is apparently annual once the eligibility date is reached. See O'Leary & Nuffield, *The Organization of Parole Systems in the United States* 106 (1972). The position respondent asserts herein would leave it to each jurisdiction to decide, as it does now, when suitability for parole is to be considered.

and Delinq. 378, 384 (1973). The complaint alleges (Complaint, para. 8, App. 10) that North Carolina does not, an allegation which finds support in published writings, *e.g.*, O'Leary & Nuffield, *The Organization of Parole Systems in the United States* 106 (1972), and is confirmed by the factual assertions made in petitioners' brief (p. 16 n.4). It seems clear that, if due process is to play any role at all, the right to appear in person is its first requisite; *cf. Goldberg v. Kelly*, 397 U.S. at 269. Indeed, the near-unanimity of its use attests to its utility and workability. "Authorities on parole procedures regard well-conducted hearings as vital to effective decision-making, in terms of expanding the information available to the board as well as for their effect on offenders." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 64 (1967). See also Dawson, *Sentencing* 253 (1969).

The State has an interest, to be sure, in not wasting time and money on a futile hearing. Accordingly, where it is certain that an applicant must be denied release under a valid general rule of undisputed applicability and universal application, the hearing may be dispensed with. An example is a rule, such as may exist in the federal prisons, 28 C.F.R. §2.29, barring release for those whose good time has been forfeited and not yet restored. Where, however, the applicability of any such rule to the applicant is disputed by him or where the Board reserves the power to waive the rule in individual cases, there must be an opportunity to be heard on the question of applicability or waiver. Accordingly, a

prisoner must be given prior notice of an intention to deny a hearing on the basis of any such rule.[27]

If a hearing is required, it must be of sufficient duration to be more than a *pro forma* ritual. *Cf.* Dressler, *Practice and Theory of Probation and Parole* 117 (2d ed. 1962). The complaint alleges (para. 2(c)(5), App. 4) that, when hearings are given, they average ten minutes or less, and this assertion is consistent with the reports of a wide assortment of disinterested observers.[28] While it seems obvious that an adequate

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[27]The assertion in petitioner's brief that hearings are denied because "the files contain information that make it obvious" that parole will be denied (Br. 16 n.4) is an assertion of a far broader and more discretionary judgment than the exception set forth in the text would permit. It is equivalent to the assertion that a hearing is not an essential prerequisite to the exercise of the parole board's discretion. Moreover, it cannot suffice to contradict the allegation in the complaint (para. 2(c)(i), App. 4) that there are "no criteria or guidelines" to determine whether a hearing is to be given.

[28]O'Leary and Nuffield, *A National Survey of Parole Decision-making*, 19 Crime and Delinq. at 385, reports that in only 11 jurisdictions are less than 20 cases heard in a day; in 25, more than 30 are heard, and, in 11, forty or more. *Cf. In re Sturm*, 11 Cal.3d 258, 262, 521 P.2d 97, 99, 113 Cal. Rptr. 361, 363 (1974) ("generally . . . no more than 10 minutes"); *Official Report of the New York State Special Commission on Attica*, 96 (1972) ("average time of the hearing, including [reading the file and deliberation] is 5.9 minutes") Citizens Inquiry on Parole and Criminal Justice, *Prison Without Walls* 49 (1975) (New York; "the majority take between six and twelve minutes," see Table A5, *id.* at 194-99); Dawson, *The Decision to Grant or Deny Parole*, 3 Wash. U.L.Q. 243, 301 (1966) (Kansas; "two or three minutes each"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee on H.R. 13118, 92d Cong., 2d Sess. at 451 (1972), (U.S. Board; 5 minutes); Note, *Parole Release*

hearing is impossible in such a short time, it is not possible to lay down a quantitative measure by which to judge whether the hearing has been held "in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552. The essential need is to recognize that, while considerations of caseload justify reasonable concern for expediting cases, there is a competing value of constitutional dimension involved, and the desire to "clean up the docket" is not to be the *only* input.[29]

(c) The right to adequate notice and opportunity to rebut.

The opportunity to know and meet the case against a person whose vital interests are at stake is one at the heart of due process protection, and ordinarily suggests rights of confrontation, full disclosure of adverse documents, and representation by counsel. *E.g., Goldberg v. Kelly*, 397 U.S. at 269-71. However, the fact that parole-release hearings are not typical adversary proceedings, have a large ingredient of discretionary judgment making potentially relevant a wide range of factors, and take place "within the walls," counsels

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Decision-making and the Sentencing Process, 84 Yale L.J. 810, 821 n. 48 (1975) (prior federal practice; "10 or 15" minutes). For a careful analysis supporting these indications, see Stanley, *Prisoners Among Us: The Problems of Parole* 3-18 to -20 (pre-publication ed., The Brookings Institution 1975).

[29]Ancillary to the right to appear is the right to supply documentary matter supporting an application for inclusion in the file which will be provided to the hearing examiner. As for a right to have supporting statements made in person at the hearing, see p. 49 n.34, *infra*.

something less than full protection. *Cf. Gagnon v. Scarpelli,* 411 U.S. at 787-88; *Wolff v. McDonnell,* 418 U.S. at 561-62. Thus, it may be that a State should be free to decide that witnesses will not be admitted or produced, whether favorable or unfavorable to the prisoner's case; that prison records and other material made available to the parole authorities will not be turned over; that counsel will not be admitted to the hearing; and that counsel will not be appointed to aid the prisoner in preparation for the hearing.

But, respondent submits, it is another matter entirely to deny the prisoner any meaningful knowledge of the nature and tenor of the factual premises of any impending adverse decision. A balancing of interests, a "mutual accommodation," *Wolff v. McDonnell,* 418 U.S. at 556, requires that some recognition be given to the strength of the interest in notice and opportunity to rebut. *Cf. Goss v. Lopez,* 419 U.S. 565, 581-84.

This Court has already adverted to the danger of factually erroneous or misleading information affecting prisoner interests in parole decisions. *Wolff v. McDonnell,* 418 U.S. at 565. And the specific allegations of the complaint, that material placed before the parole board members is "often" inaccurate or misleading and is placed there without "substantial safeguards" of reliability (para. 8(c)(i), (iii), App. 11-12), not only stands uncontradicted on this record, but is widely supported by the experience of judges, scholars and observers. "Everybody . . . who is closely connected with the processing of offenders knows that the recording of information is not treated with any great respect." Gottfredson *et al, Parole Decision Making* 49 (NCCD 1973). *Cf. In re Rodriguez,* 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (file material, later proven

in error, led parole officers to believe that prisoner, who committed a non-violent sex offense, had violent intentions, 14 Cal.3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him, *id.* at 651 n. 16); *State v. Pohlabel,* 61 N.J.Super. 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); Note, *Parole Release Decision-making and the Sentencing Process,* 84 Yale L.J. 810, 834 n.107 (1975) (erroneous listing of a prisoner's brother's conviction as his); *Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature* 88, 91 (1974) (denial of parole, because of failure to utilize educational programs, by board member unaware that no such programs then existed at the unit to which the prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); *Final Report of the Joint Committee on Prison Reform of the Texas Legislature* 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); *Hearings Before Subcommittee No. 3 of the House Judiciary Committee,* 92d Cong., 2d Sess., at 451 (1972) (testimony of Dr. Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's").

There is no conflict of interest between prisoner and board, or between prisoner and society, as to the need for accurate fact-gathering, and it is evident that disclosure fosters that interest. "Parole boards have as much stake in the accuracy of records as other criminal

justice officials. Evidence indicates that decisions are much more likely to be documented carefully and fully when information is disclosed and when those whose interests are at stake have a chance to examine and test it." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973). And while the claim that parole files are replete with sensitive and confidential matters appears to be greatly exaggerated,[30] respondent asks that this Court defer ruling on the question whether the actual file must be turned over to the prisoner, until it is presented on a record adequately describing the contents of parole files and providing a predicate for concrete examination of the competing interests involved. For the present purpose of considering the minimum standards of due process, respondent believes that the form of the notice given is of far less moment than its substance. Whether the entire file, portions of the file, or a separately-prepared summary is made known to a prisoner, the disclosure must be sufficiently factual and concrete to tell the prisoner what he might need to speak to, to alert him to any errors or misinterpretations which he might be able to set right. *Cf.* the new procedures of

[30] *Cf.* the conclusion of the National Advisory Commission, *op cit. supra,* that "in the average parole file little material is so sensitive that it cannot be reviewed with the inmate." *Id.* at 403. The consultant to the Administrative Conference in its study of federal parole procedures concluded that "most files do not seem to contain information that should not be disclosed." Johnson, *Federal Parole Procedures,* 25 Ad.L.Rev. 459, 489 (1973); see Cushman & Fleishchman, *Study of Parole Board Files, id.* at 509 (published as Appendix C to the Johnson Report). See the new disclosure requirements adopted by the U.S. Board of Parole, 28 C.F.R. §2.57(a), as amended, 40 F.R. 41342 (1975) (effective Oct. 6, 1975).

the U.S. Board of Parole, 28 C.F.R. §2.11(d), as amended, 40 F.R. 41332 (1975) (effective Oct. 6, 1975; see explanatory statement, *id.* at 41328).

In the analogous area of applications for conscientious-objector status under selective service laws, this Court has required a fair summary to be supplied the applicant, emphasizing the need to balance conflicting interests in language compellingly relevant here:

> We did not view this provision for a fair summary as a matter of grace within the Department's discretion, but rather as an essential element in the processing of conscientious objector claims. *United States v. Nugent,* [346 U.S. 1] represented a balancing between the demands of an effective system for mobilizing the Nation's manpower in times of crisis and the demands of fairness toward the individual registrant. We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishing of a fair resume, maintained the basic elements of fair play. If the balance struck in *Nugent* is to be preserved, the registrant must receive the fair summary to which he is entitled.

Simmons v. United States, 348 U.S. 397, 403.[31] And weighty as may be the needs of prison discipline or the importance of judgment, discretion and expertise, petitioners must concede that selective service likewise

[31] While there the Court was dealing with statutory protections, the Congressional language was simply the general term, "hearing", *ibid.*, and judicial construction of the selective service law has typically been informed by considerations of due process. *Cf. Brewer v. United States,* 211 F.2d 864, 866 (C.A. 4): "... to deny the registrant equal access to the evidence upon which his case is determined is to reject our most basic concept of due process."

involved a weighty governmental interest, "the demands of an effective system for mobilizing the Nation's manpower in times of crisis," *Simmons v. United States, supra.* If the law in that area nonetheless gave substantial scope to due process concerns, it hardly seems appropriate to eschew any attempt in the parole field to strike a reasonable balance between conflicting needs.

(d) The right to consult with counsel in preparing for the hearing.

It is a *non sequitur* to assert that, because parole determinations are more the application of discretion than of law, prisoners have no need for lawyers in assisting them to obtain a favorable response. *Cf. Mempa v. Rhay,* 389 U.S. 128, 135. Former Federal Prisons Director James V. Bennett made the point with simplicity and authoritativeness:

> Of course the purpose of the parole hearing is not to retry the case in the technical sense of the term, and not to argue points of law and matters of that kind. Therefore for that purpose, counsel is not needed.
>
> But on the other hand, many . . . who have come before the Parole Board are tongue-tied; they are not able to present their views in a logical straightforward manner. Many . . . are ignorant, and they just cannot say anything much in their own behalf. Therefore it would be helpful if they did have the aid of some individual. . . .

American Law Institute, *Proceedings of the 33d Annual Meeting* 262 (1956). The conclusions of Paul W. Tappan, an equally respected penologist with many

years of experience in a State system, are in accord; they are set forth in the margin.[32] Nor is it likely that

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[32] [P]risoners often need counsel because of their own inadequacies. Many are of less than normal intelligence. Most of them approach parole hearings partially paralyzed by fear and anxiety. Few are able to express themselves fully and effectively, sometimes because of language difficulties. Certainly there is little or no relationship between the offender's ability to make a favorable impression and his actual readiness for release.

> Prisoners are generally quite ineffectual in organizing the information they should put to a parole board, important as the hearing is to them, and they have little talent for arguing to the board. To put it simply, they lack those qualities that are important to their success: qualities that are the peculiar strength of the effective advocate. For these reasons the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board.
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> ". . . More specifically, it is important that there be presented effectively to the paroling authority the positive aspects of an offender's case that are relevant to his parole, matters that may be quite inadequately elucidated in the institution's records and unknown to the board, and matters in particular that the offender could not easily himself present. For example, the writer, as a parole board member, has had brought more effectively to his attention by counsel than by most parole candidates, details relating to the prisoner's family and his relationships in the home, the quality of community feeling toward the offender, the victim's attitude, and other matters."

Tappan, *The Role of Counsel in Parole Matters,* The Practical Lawyer, Feb. 1957, at 26-27. See also Dressler, *Practice and Theory of Probation and Parole* 117 (2d ed. 1962); Kadish, *The Advocate and the Expert – Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 783, 829 (1961) ("The usefulness of counsel in assisting the offender in insuring fullness and accuracy of the factual record, in presenting aspects and implications of the facts favorable to him, and in guarding against unfavorable implications, let alone rumor and overhasty conclusions, hardly seems debatable"); Stanley, *Prisoners Among Us: The Problems of Parole* 3-21 to -22 (pre-publication ed. 1975).

any substantial basis exists for the fear that counsel will somehow convert a parole hearing into a trial or (worse yet) a circus. Over 20 jurisdictions allow counsel to appear at a hearing, O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime and Delinq. 378, 386 (1973), and have presumably found means readily available to guard against abuse.[33]

Whether these considerations are sufficient to require a State to admit counsel to the hearing room is not, however, free from doubt. This Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778, rested on perceptions regarding the utility and effect of the presence of counsel in revocation proceedings, 411 U.S. at 786-88, which may be thought even less favorable to the right to counsel at release hearings, where the testimony of adverse witnesses is not required and there is not as specific an "accusatory" ingredient. At the same time, *Scarpelli* dealt with the right to appointed counsel, reserving the question whether the right to retained counsel was broader, *id* at 783 n.6. The

[33]See Feinberg, J., dissenting, in *Menechino v. Oswald*, 430 F.2d 403, 416 (C.A. 2): "[A]llowing retained counsel at a parole release hearing does not mean that he should be allowed to convert it into a trial any more than counsel could achieve such a result at a sentencing in court." *Cf.* the regulations of the United States Board of Parole:

> "Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. . . . The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement."

28 C.F.R. §2.12. See also the remarks and motion of Whitney North Seymour, Esq., American Law Institute, *op. cit. supra*, at 258, 266.

present record does not permit informed consideration of the question whether it would be useful or apt to apply the "case-by-case" approach, laid down for the appointment of counsel in revocation proceedings by *Scarpelli, id.* at 788-91, to the admissibility of retained counsel to the hearing in release proceedings. Respondent asks the Court to defer consideration of the question of right to counsel at the hearing. *Cf. Morrissey v. Brewer*, 408 U.S. at 489.[34]

Access to counsel to assist in *preparing* for the hearing is, however, another matter entirely. Here, respondent submits, the balance of interests strongly favors the claim. While counsel may not be thought needed to "try the case," there can be little doubt that the average prisoner will often be unable to make adequate use of the notice afforded him. In part, this inability is a function of the anxiety and tension generated by the imminence of the hearing (see, *e.g.*, Dressler, *op. cit. supra*, at 117), and of the prison-induced passivity of the inmate, his lack of education, fluency and confidence (*cf. Johnson v. Avery*, 393 U.S. 483, 487); it is compounded by the very fluidity of the suitability-for-release determination, and the general lack of knowledge of its procedures and priorities. At a revocation hearing (like a sentencing proceeding), the prisoner has a relatively clear idea of what he did, or is

[34]Similarly, the question whether supporting "witnesses" must be heard in person should be deferred until the interests at stake can be made more fully known through litigation addressed to the issue. For a preliminary indication that such appearances are helpful to parole examiners as well as prisoners, see Beck, *Effect of Representation at Parole Hearings* 2,12-14 (U.S. Bd. of Parole Research Unit 1974).

charged with, that is likely to affect the result. Parole—as those opposing due process protections have repeatedly emphasized—is not focussed specifically on one or a few "accusations." Counsel, having "skills which the [prisoner] is unlikely to possess," *Gagnon v. Scarpelli*, 411 U.S. at 786, will often be able to sort out from the information known and supplied those items which may be erroneous or misleading or likely to be given too little or too much weight. Counsel can assist the prisoner in preparing for his own statement at the hearing, so that he is more likely to go there knowing what he wants to say and what issues he wants to address, and not merely enter the hearing room with the vague hope that through some magical process the board member or hearing officer will seem receptive to the notion of release or ask questions which the prisoner can answer.

At the same time, the State interests militating against the participation of counsel in the hearing room are inapplicable to preparatory consultation with the prisoner. Attorneys and visitors are permitted to meet with inmates, and no substantial State interest is intruded upon by provision of the opportunity to consult. We do not here contend that counsel must be appointed, *cf. Goldberg v. Kelly*, 397 U.S. at 270, but that such counsel or counsel-substitute as is available be given an adequate opportunity to have access to the material supplied to the prisoner, and to consult with him prior to the hearing. Such assistance may come from retained counsel, but may be available from other sources as well: It might come from a law school or legal services program which has chosen to assist prisoners at the institution in question; it might come from correctional staff members, or other inmates,

whom the institution permits to assist, and who choose to assist, prisoners in this way;[35] it might come from some other source. Of course, a prisoner would be entitled to be advised of the availability of the right of consultation, and of the presence of any source (such as a legal services program) which offers its services in that particular institution.

The opportunity to consult must be afforded sufficiently in advance of the hearing that the functions of counsel can be adequately discharged. This includes adequate time for counsel to review and digest the material, to discuss the case with the prisoner, and to advise him. It also includes a reasonable opportunity to consult court and other records to verify claims that the facts are inaccurately or incompletely set forth in the material to be presented to the examiner. In many cases, this verification will need to be done, or at least confirmed, by mail. Accordingly, several weeks will typically be the minimum period required.

(e) The right to an adequate statement of reasons for denial.

There is probably no aspect of the release decision-making process which has attracted more intense criticism than the failure to give the prisoner an indication of the reason why he is being continued in

[35] Respondent urges the Court to reserve, until it is more centrally presented, the question whether the Constitution permits correctional authorities to forbid an inmate from helping another in this situation. *Cf. Johnson v. Avery*, 393 U.S. 483; *Wolff v. McDonnell*, 418 U.S. 539, 579.

institutional custody.[36] Failure to give reasons serves no State interest save that of rushing on to the next case, and powerfully disserves the interest in enhancing the likelihood that discretion has been exercised responsibly and lawfully, on the basis of factually correct assumptions. *Cf. Wolff v. McDonnell*, 418 U.S. at 565. Beyond that, it requires a person whose notions of penology draw support more from the visions of Franz Kafka than the values of the Fourteenth Amendment and of our penological system[37] to discern the rehabilitative potential of refusing to tell a prisoner why he must remain a prisoner, and whether there is anything he can do to shorten his term. *Cf. Morrissey v. Brewer*, 408 U.S. at 484; Davis, *Discretionary Justice* 128 (1969).

To be adequate, a statement of reasons must sufficiently identify the conduct or factor relied on.

[36]As of 1972, forty jurisdictions did not record the reasons for the decision in their own records. O'Leary & Nuffield, *A National Survey of Parole Decision-Making*, 19 Crime and Delinq. 378, 385 (1973). There has probably been substantial change since then, as a result of legislative, administrative and judicial action. *E.g.*, Ch. 131, Laws of New York 1975, §1 (1975 McKinney's Session Law News 180) (N.Y. Correction Law, §214(6)); Ill. Ann. Stat. §38-1003-3-5; 28 C.F.R. §2.13(d); *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193 (1971); *In re Sturm*, 11 Cal.3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974).

The complaint specifically alleges (para. 2(c)(6), App. 5) that no written statement of reasons is provided in North Carolina. This allegation must be taken as true in the present posture of the case, despite the assertion to the contrary in petitioners' brief (p.16 n.4).

[37]*E.g.*, the statements of policy in North Carolina parole statutes, No. Car. Gen. Stat. §§148-58, -60, and the federal statute and regulations, 18 U.S.C. §4203(a), 28 C.F.R. §2.18.

"Poor adjustment" or "bad risk" is obviously too vague and conclusory to have meaning, *cf. Haymes v. Regan*, 394 F.Supp. 711,714 (S.D.N.Y.), but an elaborate discussion is not required, so long as what is succinctly conveyed is sufficiently factual. Even such brief summaries as "three prior convictions," "five disciplinary violations," "lack of a post-release work plan," may suffice if the notice given prior to the hearing enables the prisoner to relate those phrases to discernible events or issues. Obviously, less laconic and routinized statements are less likely to trench on the border of meaninglessness.[38]

III.

IT IS AN UNCONSTITUTIONAL INTERFERENCE WITH A PRISONER'S RIGHT OF ACCESS TO THE COURTS FOR THE BOARD OF PAROLES TO BE SYSTEMATICALLY PROVIDED COPIES OF LEGAL PLEADINGS FILED BY APPLICANTS FOR PAROLE

Entirely apart from the issues of minimal procedural protection presented in the preceding section, respond-

[38]See the new requirements laid down by the U.S. Board of Parole, 28 C.F.R. §2.13(a), as amended, 40 F.R. 41332 (1975) (effective Oct. 6, 1975). Statements which simply track the language of general criteria for release or denial of release will seldom contain an intelligible reason for the conclusion that the criteria applied were deemed applicable in the particular case. *Cf. Craft v. Attorney General*, 379 F.Supp. 538, 540 (M.D. Pa.); *Candarini v. Attorney General*, 369 F.Supp. 1132, 1137 (E.D.N.Y.).

ent submits that the judgment of dismissal was in any event erroneous as to the challenge to the practice of including copies of legal pleadings (including petitions for *habeas corpus*) in the file provided to members or officials of the Board of Paroles considering individual cases (Complaint, para. 2(c)(3), App. 4).[39] It needs no argument to perceive the serious "chilling effect" which such a practice must necessarily have on a prisoner's right of access to the courts.[40] But "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Johnson v. Avery*, 393 U.S. 483, 485.

No legitimate State interest in advising Board members that an applicant is seeking judicial redress has been suggested, even on the assumption (*but cf. Johnson v. Avery, id.* at 486) that such an interest could override the right of access to court. Nor is it relevant that any person could examine the "public record" of an applicant's pleadings filed at the courthouse, as suggested by the District Court (App. 23). There is a world of difference between such a practice and the systematic channeling of this information by correctional authorities to parole board personnel. It is to the action of the correctional authorities, and not of the members or employees of the Board of Paroles, that this challenge is addressed.

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[39]This aspect of the case, although briefed on appeal, was not ruled on by the Court of Appeals, doubtless because the entire matter was remanded by it for trial and redetermination of the merits (Pet. 16).

[40]Indeed, the North Carolina parole statute expressly requires the Board to give consideration to the probability that the applicant "harbors no resentment against . . . the judge, prosecuting attorneys, or jury that convicted" him (No. Car. Gen. Stat. 148-60).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed. Further, it would be appropriate for the Court to define with some specificity the minimum procedural protections to which respondent is entitled.

Respectfully submitted,

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APPENDICES

A. Statutory Provisions

No. Car. Gen. Stat. §1-253 (1A Gen. Stats. N.C. (1969)):

§1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

No. Car. Gen. Stat. §15-217 (1C Gen. Stats. N.C. (1975)):

§15-217. Institution of proceeding; effect on other remedies.—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to

collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this Article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this Article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof. (1951, c. 1083, s. 1; 1957, c. 349, s. 10; 1959, c. 21; 1965, c. 352, s. 1; 1967, c. 996, s. 13.)

No. Car. Gen. Stat. §17-1 (1C Gen. Stats. N.C. (1975)):

§17-1. Remedy without delay for restraint of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const., art. 1, s. 18; Rev., s. 1819; C. S., s. 2203.)

No. Car. Gen. Stat. §148-58 (3C Gen. Stats. N.C. (1974)):

§148-58. Time of eligibility of prisoners to have cases considered.—All prisoners shall be eligible to have their cases considered for parole when they have

served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 10 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits. (1935, c. 414, s. 8; 1955, c. 867, s. 5.)

No. Car. Gen. Stat. §148-60 (3C Gen. Stats. N.C. (1974)):

§148-60. Time for release of prisoners discretionary.—The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner. (1935, c. 414, s. 10.)

B. Guidelines for Parole Release Considerations, U.S. Board of Parole (28 C.F.R. §2.20, as amended, 40 F.R. 41334, 41337 (1975)):

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Low				
Immigration law violations Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
Low Moderate				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000). Drugs marihuana, simple possession (less than $500) Forgery/fraud (less than $1,000) Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 25 mo.
Moderate				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihauna, possession with intent to distribute/sale (less than $5,000). "Soft drugs", possession with intent to distribute/sale (less than to $5,00) Embezzlement (less than $20,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprision of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/Transporting of Aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale).	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 30 mo.

High	
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possess $20,000-$100,000). Counterfeiting (manufacturing) Drugs: Marihuana, posession with intent to distribute/sale ($5,000 or more). "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Embezzlement ($20,000 to $100,000) Firearms Act, possession/purchase sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force commercial purposes) Organized vehicle theft Receiving stolen property ($20,000 to $100,000) Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo. - 20 to 25 mo. - 26 to 32 mo. - 32 to 38 mo.
Very High	
Robbery (weapon or threat) Drugs: "Hard drugs" (possession with intent to distribute sale) [no prior conviction for sale of "hard drugs"]. "Soft drugs", possession with intent to distribute/sale (over $5,000) Extortion Mann Act (force) Sexual act (force)	26 to 36 mo. - 36 to 45 mo. - 45 to 55 mo. - 55 to 65 mo.
Greatest	
Aggravated felony (e.g. robbery, sexual act, aggravated assault) weapon fired or personal injury. Aircraft hijacking Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"]. Espionage Explosives (detonation) Kidnapping Willful homicide	(Greater than above, however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

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SALIENT FACTOR SCORE

Case name _____ Register No _____

Item A . . . . . □
- No prior convictions (adult or juvenile) = 2
- One or two prior convictions = 1
- Three or more prior convictions = 0

Item B . . . . . □
- No prior incarcerations (adult or juvenile) = 2
- One or two prior incarcerations = 1
- Three or more prior incarcerations = 0

Item C . . . . . □
- Age at first commitment (adult or juvenile) 18 years or older = 1
- Otherwise = 0

Item D . . . . . □
- Commitment offense did not involve auto theft = 1
- Otherwise = 0

Item E . . . . . □
- Never had parole revoked or been committed for a new offense while on parole = 1
- Otherwise = 0

Item F . . . . . □
- No history of heroin or opiate dependence = 1
- Otherwise = 0

Item G . . . . . □
- Has completed 12th grade or received GED (prior to this commitment) = 1
- Otherwise = 0

Item H . . . . . □
- Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
- Otherwise = 0

Item I . . . . . □
- Release plan to live with spouse and/or children = 1
- Otherwise = 0

Total score . . . . . □